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Supreme Court, U.S.
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In The

# Supreme Court of the United States

BEN W. ALLUSTIARTE, BENJAMIN ALLUSTIARTE, GAYLE ALLUSTIARTE, LINDA A. ALLUSTIARTE, WILLIAM J. CONNOLLY, RUTH F. HOWARD, JAMES D. HUFFER, KARIN HUFFER, JOHN L. JOHNSTON, RAJ KUMAR, CHARLES G. MILDEN, SUSAN P. MILDEN, MARIANNE A. PACK, FRANCES PALMER, ROBERT PALMER, and WESTERN INVESTORS GROUP, INC.,

*Petitioners,*

v.

THE UNITED STATES,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit**

## PETITION FOR WRIT OF CERTIORARI

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34 pp

## QUESTION PRESENTED

The petitioners filed a claim against the United States in the United States Court of Federal Claims alleging that certain decisions of various bankruptcy courts in the Ninth Circuit amounted to takings of their property without just compensation in violation of the Fifth Amendment to the United States Constitution.

The Court of Federal Claims dismissed the action for lack of jurisdiction. The Court of Appeals for the Federal Circuit affirmed. The question presented here is:

Should a decision of a bankruptcy court that results in a devaluation or loss of property to a debtor, a creditor, or a person not a party to the bankruptcy action, but which is proper and routine in the administration of the bankruptcy estate, be considered a taking of property without just compensation for which the property owner may seek compensation in an independent claim in the Court of Federal Claims?

## CORPORATE DISCLOSURE

The petitioner Western Investors Group, Inc., a corporation, is owned by the petitioners James D. Huffer and Karin Huffer. There is no parent corporation or publicly held company owning any of its stock.

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## PETITION FOR WRIT OF CERTIORARI

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit entered in this proceeding on July 16, 2001, on the important issue presented here.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit that gives rise to this petition is reprinted in Appendix A at App. 1. It is published in 256 F.3d 1349 (Fed. Cir. 2001). The opinion of the United States Court of Federal Claims that was appealed to the Federal Circuit is reprinted in Appendix B at App. 8. It is published in 46 Fed. Cl. 713 (2000).

## JURISDICTION

On July 16, 2001, the United States Court of Appeals for the Federal Circuit affirmed the dismissal of the petitioners' claims by the United States Court of Federal Claims. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days after the entry of that decision.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Section 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

(1) United States Constitution, Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

(2) 28 U.S.C., Section 1491(a)(1):

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding, in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

## STATEMENT OF THE CASE

Petitioners Ben W. Allustiarte and Linda Allustiarte filed for an arrangement as farmers under Chapter XII of the Bankruptcy Act of 1898. Petitioners William J. Connolly, Ruth F. Howard, James D. Huffer, Karin Huffer, John L. Johnston, Raj Kumar, Charles G. Milden, Susan P. Milden, and Western Investors Group, Inc. were originally debtors in various cases under Chapter 11 of the Bankruptcy Code. At the beginning of each case the assets of the debtors exceeded their liabilities. In each case, the court-appointed trustees either sold their property for much less than its value or administered their estates in such a way that greatly diminished their estates. As an example, in the petitioner Raj Kumar's Chapter 11 case, the bankruptcy court approved the sale of his sod farm for $500,000.00 although he had an offer from two bona fide purchasers to buy it for $1.5 million. This resulted in a loss to him of $1 million.

In the cases of petitioners Benjamin Allustiarte, Gayle Allustiarte, and Marianne A. Pack, property belonging to them was included in the bankruptcy estates of Ben W. Allustiarte and Linda Allustiarte. In the cases of Frances Palmer and Robert Palmer, the only creditor petitioners, their secured interests in the property of a bankruptcy debtor were diminished by actions of a bankruptcy trustee and a bankruptcy court.

In several of the above cases, the bankruptcy court rulings were appealed (see footnote 1, App. 5), and the rulings of the bankruptcy courts were affirmed as valid and proper under the bankruptcy statutes. The petitioners filed a claim in the United States Court of Federal

Claims, alleging that the losses of their property as the result of authorized bankruptcy court rulings constituted takings by the government without just compensation. In each case the public benefit was the efficient administration of the bankruptcy system. The Court of Federal Claims dismissed the case on the ground that it did not have the jurisdiction to review the discretionary decisions of bankruptcy judges and that the petitioners' claims were collateral attacks on the bankruptcy court judgments. An appeal was taken to the Federal Circuit, which affirmed.

## REASONS FOR GRANTING THE WRIT

### I. The Federal Circuit's Decision Seriously Misinterprets The Opinion Of The United States Supreme Court In *Preseault v. Interstate Commerce Commission* As To Whether A Takings Claim Is Independent Of Any Substantive Challenge To The Decision Of Any Court Or Agency.

As its basis for upholding the decision of the Court of Federal Claims, the Federal Circuit said that the Court of Federal Claims "does not have jurisdiction to review the decisions of district courts" (App. 4-5, citing *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994)), and that the proper way to get review of a bankruptcy court decision is by appealing it to the district court and then to the Court of Appeals. (App. 5, citing *Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995)).

The petitioners, however, were not seeking review of the bankruptcy court decisions. They brought their claims

to the Court of Federal Claims as an independent action seeking just compensation for takings under the Fifth Amendment, pursuant to the jurisdiction of the Court of Federal Claims under 28 U.S.C., Section 1491(a)(1). To support this, the petitioners cited *Preseault v. Interstate Commerce Commission*, 494 U.S. 1 (1990), in which the plaintiffs challenged the ICC's denial of their petition for a certificate of abandonment of a railway right-of-way, thus denying plaintiffs their reversionary interest in the right-of-way. Instead, the ICC allowed the right-of way to become a national trail under ICC jurisdiction under 16 U.S.C., Sections 1241 et seq.

The plaintiffs challenged the statute's constitutionality on grounds it was beyond the jurisdiction of Congress under the Commerce Clause and that it resulted in a taking of their property without just compensation in violation of the Fifth Amendment. The Second Circuit upheld the statute and the ICC's denial of plaintiffs' petition, 853 F.2d 145 (2d Cir. 1988). The Supreme Court affirmed, 494 U.S. 1 (1990), but with this gloss: the plaintiffs could still bring a takings claim to the Court of Federal Claims, which they did. *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996).

The *Preseault* case brought to the Court of Federal Claims was not regarded as a collateral attack on the rulings of the Second Circuit or the Supreme Court, nor was it regarded as plaintiffs' seeking review of a discretionary decision of the ICC (denying their petition for abandonment). The takings case brought to the Court of Federal Claims was an independent action seeking just compensation for a taking.

In its opinion in the present case, the Federal Circuit distinguished *Preseault* in the following respects:

(1) The Preseaults' Second Circuit appeal challenged the constitutionality of a statute, whereas the petitioners' appeals to the Ninth Circuit challenged the actions of bankruptcy trustees under the bankruptcy laws. (App. 5-6).

(2) The Preseaults' takings claim in the Court of Federal Claims was based on the operation of the statute whose constitutionality they had unsuccessfully challenged in the Second Circuit and the Supreme Court, whereas petitioners' takings claims are based on the bankruptcy courts' approval of the actions of the bankruptcy trustees. (App. 6).

These distinctions are immaterial. Suppose the Preseaults, instead of challenging the constitutionality of the statute, had simply appealed from the ICC's denial of their petition for a certificate of abandonment? The result would have been the same. If the ICC's action were upheld by the appellate courts, the Preseaults, in accordance with the Supreme Court decision, would have been allowed to bring a takings claim to the Court of Federal Claims. As the Second Circuit noted in *Preseault*, the ICC had discretion as to whether to allow an abandonment of a rail route. 853 F.2d at 151. But the Preseaults' takings case was permitted. The Court of Federal Claims had jurisdiction to hear it. It was not a collateral attack on the appellate decisions, nor was it asking the Court of Federal Claims to review the decision of the ICC.

Likewise in the present case, the bankruptcy court judgments stand as valid decisions under the bankruptcy

statutes. But if they resulted in takings of petitioners' property, then the petitioners, like the Preseaults, should have recourse to the Court of Federal Claims under 28 U.S.C., Section 1491(a)(1). What the judgment of the Federal Circuit does in the present case is to deny petitioners that statutory remedy.

In the *Preseault* case, neither the ICC nor the Second Circuit had jurisdiction to award the Preseaults compensation for the taking of their property as a national trail. Likewise in the present case, neither the bankruptcy courts nor any court in the bankruptcy appellate system had jurisdiction to award petitioners compensation for the losses of their property. Under Section 1491(a)(1), only the Court of Federal Claims may do that. What the Federal Circuit has done is close that door to them. The Supreme Court in *Preseault v. ICC*, 494 U.S. 1 (1990), has specifically allowed a takings case to be brought after an unsuccessful appeal from an agency decision. The Federal Circuit in the present case has unduly narrowed the scope of *Preseault*, and this may affect not only property owners in bankruptcy cases but also property owners who have unsuccessfully challenged the discretionary decisions of any federal agency that result in takings of property. The Supreme Court should now make it clear that the takings clause of the Fifth Amendment applies to actions of a bankruptcy court as it does to actions of the ICC.

## CONCLUSION

The merits of the petitioners' claims are not at issue in this case. The only issue is jurisdiction. It is clear that the United States Court of Federal Claims has jurisdictions to hear cases arising out of the takings clause of the Fifth Amendment. As the Supreme Court indicated in *Preseault,* a takings claim may be brought to the Court of Federal Claims even if the claimants had unsuccessfully appealed other issues in an appellate court. The Court should grant this petition.

Respectfully submitted,

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## APPENDIX A

**United States Court of Appeals**
**for the Federal Circuit**

00-5112

BEN W. ALLUSTIARTE, BENJAMIN ALLUSTIARTE, GAYLE ALLUSTIARTE, LINDA A. ALLUSTIARTE, WILLIAM J. CONNOLLY, RUTH F. HOWARD, JAMES D. HUFFER, KARIN HUFFER, JOHN L. JOHNSTON, RAJ KUMAR, CHARLES G. MILDEN, SUSAN P. MILDEN, MARIANNE A. PACK, FRANCES PALMER, ROBERT PALMER, and WESTERN INVESTORS GROUP, INC.,

Plaintiffs-Appellants

v.

THE UNITED STATES,

Defendant-Appellee.

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DECIDED: July 16, 2001

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Before CLEVENGER, SCHALL, and GAJARSA, Circuit Judges.

SCHALL, Circuit Judge.

This is an appeal from the decision of the United States Court of Federal Claims that dismissed appellants' complaint against the United States for lack of subject matter jurisdiction. *Allustiarte v. United States*, 46 Fed. Cl. 713 (2000). The court determined that it did not have jurisdiction to consider appellants' allegations "that the actions approved by the bankruptcy courts [of the Ninth

Circuit] resulted in takings . . . in violation of the Fifth Amendment to the Constitution." *Id.* at 716. Because the Court of Federal Claims does not have jurisdiction to review decisions of federal bankruptcy courts, we affirm.

## BACKGROUND

Appellants were involved in bankruptcy proceedings in bankruptcy courts in the Ninth Circuit. Appellants sued the United States in the Court of Federal Claims, asserting in their complaint that the "improprieties in certain actions of the Bankruptcy Courts in the Ninth Circuit. . . . constituted a taking without just compensation in violation of the Fifth Amendment to the United States Constitution." Appellants Ben W. Allustiarte, Linda M. Allustiarte, William J. Connolly, Ruth F. Howard, James D. Huffer, Karin Huffer, John L. Johnston, Raj Kumar, Charles G. Milden, Susan P. Milden, and Western Investors Group, Inc. were debtors who filed for bankruptcy. These appellants allege that court-appointed bankruptcy trustees sold their assets for less than they were worth or otherwise handled their property in a manner that diminished their estates. Appellants Benjamin Allustiarte, Gayle Allustiarte, and Marianne A. Pack allege that a bankruptcy trustee wrongfully included their property in the bankruptcy estates of Ben W. Allustiarte and Linda M. Allustiarte. Appellants Robert Palmer and Frances Palmer are creditors who allege in one count that a court-appointed bankruptcy trustee awarded their interest in a bankruptcy debtor's property to another party, and who allege in another count that a bankruptcy trustee awarded them too little in their action against a bankruptcy debtor. Appellants

assert that the losses they suffered as a result of the bankruptcy courts' approval of the actions of the bankruptcy trustees constitute takings for which they are entitled to just compensation.

The government moved the Court of Federal Claims to dismiss appellants' complaint for lack of subject matter jurisdiction. In granting the government's motion, the court noted that it could find no precedent "in which the discretionary actions of a Bankruptcy Court judge [were found to] constitute a taking under the Fifth Amendment." *Allustiarte*, 46 Fed. Cl. at 716. Appellants had cited *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935), *United States v. Security Industrial Bank*, 459 U.S. 70 (1982), and *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237 (1983), *aff'd*, 765 F.2d 159 (Fed. Cir. 1985) (unpublished table decision), to support their position. However, the court determined that while those cases acknowledged that amendments to the bankruptcy laws, if retroactive in nature, "could violate the Takings Clause of the Fifth Amendment," they did not "support [appellants'] theory that the discretionary actions of a bankruptcy judge can result in a . . . taking." *Id.* at 717-18.

The court also recognized that it "does not have jurisdiction to review decisions issued during the normal course of bankruptcy proceedings." *Id.* at 718. Instead, "[r]elief from [such] judgments may be found in timely appeals to the appropriate federal district courts, Circuit Courts of Appeal and ultimately to apply for certiorari to the United States Supreme Court." *Id.* The court therefore dismissed appellants' complaint for lack of jurisdiction. Our jurisdiction over the appeal of the dismissal is provided by 28 U.S.C. § 1295(a)(3) (1994).

## DISCUSSION

The subject matter jurisdiction of the Court of Federal Claims is a question of law that we review *de novo*. *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1286-87 (Fed. Cir. 1999). The court here correctly determined that it lacks jurisdiction over appellants' challenges to the actions of the Ninth Circuit bankruptcy courts.

Each appellant's takings claim is based on an allegedly improper action by a bankruptcy trustee that was approved by a Ninth Circuit bankruptcy court. Appellants admit that the judgments of the bankruptcy courts were authorized by the applicable bankruptcy laws. They contend that they are not asking the Court of Federal Claims to review those judgments. However, in order for the court to entertain appellants' takings claims, it would have to determine whether appellants suffered a categorical taking of their property at the hands of the bankruptcy trustees and courts, or whether the courts' and trustees' actions defeated their reasonable, investment-backed expectations. *See, e.g., Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1362 (Fed. Cir. 2001) (explaining that a regulatory scheme may effect one of two types of takings: a categorical taking that deprives the property owner of all economically viable use of the property, or a non-categorical taking that defeats the property owner's reasonable, investment-backed expectations). Such a determination would require the court to scrutinize the actions of the bankruptcy trustees and courts.

As we stated in *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994), "the Court of Federal Claims does

not have jurisdiction to review the decisions of district courts." Moreover, the Supreme Court has stated that if a party is "dissatisfied with the Bankruptcy Court's ultimate decision, [it] can appeal 'to the district court for the judicial district in which the bankruptcy judge is serving,' and then to the Court of Appeals." *Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995) (quoting 28 U.S.C. § 158(a) and citing 28 U.S.C. § 158(d)) (internal citations omitted). To permit collateral attacks on bankruptcy court judgments would "seriously undercut[ ] the orderly process of the law." *Id.* The proper forum for appellants' challenges to the bankruptcy trustees' actions therefore lies in the Ninth Circuit, not the Court of Federal Claims.[1]

Appellants cite *Preseault v. Interstate Commerce Commission*, 494 U.S. 1 (1990), for the proposition that the availability of appellate review in the Ninth Circuit does not preclude their ability to bring a takings claim in the Court of Federal Claims. The petitioners in *Preseault* had challenged the constitutionality of a statute, alleging that it effected a taking of their property. *Id.* at 10. The Second Circuit denied their challenge, and the Supreme Court affirmed that decision. *Id.* The Supreme Court determined, however, that the petitioners could bring suit in the United States Claims Court (the predecessor to the Court of Federal Claims) to seek compensation for the

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[1] Some appellants here did pursue judicial review in the Ninth Circuit. *See, e.g., In re Allustiarte*, 786 F.2d 910 (9th Cir. 1986); *In re Allustiarte*, 884 F.2d 1394 (9th Cir. 1989) (unpublished table decision); *In re Connolly*, 141 F.3d 1174 (9th Cir. 1998) (unpublished table decision); *Johnston v. JEM Devel. Co.*, 149 B.R. 158 (B.A.P. 9th Cir. 1992); *In re Milden*, 111 F.3d 138 (9th Cir. 1997) (unpublished table decision).

alleged taking. *Id.* at 11-17. The petitioners did so and, in due course, this court determined that they had suffered a taking for which they were entitled to just compensation. *Preseault v. United States*, 100 F.3d 1525, 1552 (Fed. Cir. 1996).

Appellants analogize their situation to that of the petitioners in *Preseault*: Like the Preseaults, who pursued an appeal to the Second Circuit, appellants availed themselves of the judicial review available in the Ninth Circuit, and, like the Preseaults, who were permitted to subsequently pursue a takings claim in the Court of Federal Claims, appellants now seek to pursue their takings claims in the Court of Federal Claims. The claims litigated in *Preseault*, however, are quite distinct from appellants' claims. First, the Preseaults' Second Circuit appeal challenged the constitutionality of a statute under the Takings Clause of the Fifth Amendment; appellants' Ninth Circuit proceedings challenged the actions of the bankruptcy trustees under the bankruptcy laws. Second, the Preseaults' takings claim in the Court of Federal Claims was based on the operation of the statute whose constitutionality they had unsuccessfully challenged in the Second Circuit and the Supreme Court; appellants' takings claims are based on the bankruptcy courts' approval of the actions of the bankruptcy trustees. Nothing in *Preseault* suggests that appellants can bring such takings claims in the Court of Federal Claims.

## CONCLUSION

For the foregoing reasons, the decision of the Court of Federal Claims dismissing appellants' complaint for lack of subject matter jurisdiction is

*AFFIRMED.*

## APPENDIX B

**In the United States Court of Federal Claims**

**No. 99-1010L**
**FILED: May 24, 2000**

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| BEN W. ALLUSTIARTE, et al., | * | Jurisdiction; Motion to Dismiss; Bankruptcy Court Decisions. |
| Plaintiffs, | * | |
| v. | * | |
| UNITED STATES, | * | |
| Defendant. | * | |

**WILLIAM T. BARRANTE**, Watertown, CT, attorney of record for the plaintiffs.

**SUSAN V. COOK**, General Litigation Section, Environment and Natural Resources Division, United States Department of Justice, Washington, D.C., attorney of record for the defendant.

### OPINION

HORN, J.

### FINDINGS OF FACT

The plaintiffs, Ben W. Allustiarte, et al., filed a complaint and request for damages with this court on December 22, 1999. For the purposes of this motion, the facts are not in dispute. Plaintiffs state, "In each of the counts the action of the bankruptcy Judge was 'authorized,' that is,

the judges acted within their statutory powers under the bankruptcy statutes."

The complaint contains ten counts from multiple plaintiffs who allege that the rulings issued by the bankruptcy courts involved in their respective proceedings were improper and caused them significant losses. Plaintiffs contend that the actions of the bankruptcy courts constitute a taking of plaintiffs' property without just compensation, in violation of the Fifth Amendment to the United States Constitution. Plaintiffs also allege that because of defendant's failure to pay just compensation to the plaintiffs, the orders, decrees and judgments of the bankruptcy courts should be considered "void judgments within the meaning of Rule 60(b)(4) of the Federal Rules of Civil Procedure, as adopted by the United States Court of Federal Claims."

In the words of count 1 of the complaint, "Ben W. Allustiarte and Linda M. Allustiarte filed a petition for a real estate arrangement as farmers under Chapter XII of the Bankruptcy Act of 1898" on August 15, 1979. They allege that the bankruptcy trustee sold plaintiffs' real estate at prices below its fair market value, resulting in a net loss of $24,014,194.00.

In count 2, Benjamin A., Gregory and Gayle Allustiarte, along with Marianne A. Pack, allege that two pieces of real estate held jointly between them were wrongfully included in the bankruptcy estates of Ben W. and Linda Allustiarte. Plaintiffs in count 2 claim damages in the amount of $5,196,197.68.

Plaintiff in count 3, William J. Connolly, filed for bankruptcy in February 1988 under Chapter 11 of the

Bankruptcy Code. Plaintiff alleges that the court appointed trustee wrongfully devastated his estate, failed to satisfy IRS claims against plaintiff, and failed to account for income earned by the estate from oil leases. Plaintiff Connolly claims damages in the amount of $4,905,255.25.

In count 4, plaintiff, Ruth F. Howard, filed for relief under Chapter 11 of the Bankruptcy Code in July of 1988. Plaintiff claims that she lost $273,000.00 due to the administration of her estate by the court approved bankruptcy trustee.

Plaintiffs in count 5, James D. and Karin Huffer, and Western Investors Group, Inc., which is wholly owned by plaintiffs James D. and Karin Huffer, filed for relief under Chapter 11 of the Bankruptcy Code in 1984. Plaintiffs allege that the bankruptcy trustee devastated their estate by allowing creditors to foreclose on certain pieces of property owned by plaintiffs in actions approved by the Bankruptcy Court. Plaintiffs claim damages in the amount of $1,575,000.00.

In count 6, plaintiff, John L. Johnston, filed for relief in the Bankruptcy Court on April 23, 1990. Plaintiff claims that the court appointed trustee improperly devastated plaintiff's estate in various respects, resulting in a loss of $945,789.32 to plaintiff.

In count 7, plaintiff, Raj Kumar, filed for relief under the Bankruptcy Code in September 1986. Plaintiff complains that the Bankruptcy Court approved the sale of his property to a neighbor and business competitor, despite plaintiff's objections. Plaintiff claims he opposed the sale because of bona fide offers significantly exceeding the

offer from his neighbor. Plaintiff claims $1,000,000.00 in damages.

In count 8, plaintiffs, Charles G. and Susan P. Milden, filed for relief under Chapter 11 of the Bankruptcy Code in October 1991. Plaintiffs claim that the court abandoned portions of plaintiffs' property allowing an allegedly undervalued sale. According to the plaintiffs, the trustee settled a lawsuit in which plaintiffs were litigants for less than it was worth. The settlement was approved by the Bankruptcy Court in September of 1993, and in November of 1999, the court approved the trustee's final report. Plaintiffs claim damages in the amount of $55,857,961.20.

Counts 9 and 10 consist of claims from the only creditor-plaintiffs in the lawsuit, Robert and Frances Palmer. Plaintiffs allege that the Bankruptcy Court and its trustee improperly awarded plaintiffs' interests in a debtor's property, precluding plaintiffs from recovering all that they should have received. Count 9 requests damages in the amount of $73,000.00, while count 10 requests damages in the amount of $35,000.00.

## DISCUSSION

The defendant has filed a motion to dismiss pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims (RCFC) for lack of subject matter jurisdiction. Subject matter jurisdiction may be challenged at any time by the parties, by the court *sua sponte*, or on appeal. *Booth v. United States*, 990 F.2d 617, 620 (Fed. Cir. 1993), *reh'g denied* (1993); *United States v. Newport News Shipbuilding & Dry Dock Co.*, 933 F.2d 996, 998 n.1 (Fed. Cir. 1991). Once jurisdiction is challenged by the court or the

opposing party, the plaintiff bears the burden of establishing jurisdiction. *McNutt v. General Motors Acceptance Corp. of Indiana*, 298 U.S. 178, 189, 565 S. Ct. 780, 80 L. Ed. 1135 (1936). A plaintiff must establish jurisdiction by a preponderance of the evidence. *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988); *Alaska v. United States*, 32 Fed. Cl. 689, 695 (1995), *appeal dismissed*, 86 F.3d 1178 (Fed. Cir. 1996). When construing the pleadings pursuant to a motion to dismiss, the court should not grant the motion "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Son Broadcasting, Inc. v. United States*, 42 Fed. Cl. 532, 537 (1998) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957) (footnote omitted)).

Pursuant to RCFC 8(a)(1) and the Federal Rules of Civil Procedure 8(a)(1), a plaintiff need only state in the complaint "a short and plain statement of the grounds upon which the court's jurisdiction depends." However, "[d]etermination of jurisdiction starts with the complaint, which must be well-pleaded in that it must state the necessary elements of the plaintiff's claim, independent of any defense that may be interposed." *Holley v. United States*, 124 F.3d 1462, 1465 (Fed. Cir. 1997), *reh'g denied* (1997). *Pro se* plaintiffs can be held to less stringent standards than formal pleadings drafted by lawyers. *Boyle v. United States*, 44 Fed. Cl. 60 (1999) (citing *Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S. Ct. 594, 30 L. Ed. 2d 652, *reh'g denied*, 405 U.S. 948, 92 S. Ct. 963, 30 L. Ed. 2d 819 (1972)), *aff'd*, 200 F.3d 1369 (Fed. Cir. 2000). Nonetheless, "conclusory allegations unsupported by any factual assertions will not withstand a motion to dismiss." *Briscoe v. LaHue*,

663 F.2d 713, 723 (7th Cir. 1981), *aff'd*, 460 U.S. 325, 103 S. Ct. 1108, 75 L. Ed. 2d 787 (1983).

When deciding on a motion to dismiss based on either lack of subject matter jurisdiction or failure to state a claim, this court must assume that all undisputed facts alleged in the complaint are true and must draw all reasonable inferences in the plaintiff's favor. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974); *see also Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995); *Hamlet v. United States*, 873 F.2d 1414, 1416 (Fed. Cir. 1989). If a defendant challenges jurisdiction or plaintiff's claim for relief, however, the plaintiff cannot rely merely on allegations in the complaint but must instead bring forth relevant, competent proof to establish jurisdiction. *McNutt v. General Motors Acceptance Corp. of Indiana*, 298 U.S. at 189; *see also Land v. Dollar*, 330 U.S. 731, 735, 67 S. Ct. 1009, 91 L. Ed. 1209 (1947); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d at 747; *Catellus Development Corp. v. United States*, 31 Fed. Cl. 399, 404-05 (1994). The court may consider all relevant evidence in order to resolve the factual dispute, including evidentiary matters outside the pleadings. *Indium Corp. of America v. Semi-Alloys, Inc.*, 781 F.2d 879, 884 (Fed. Cir. 1985), *cert. denied*, 479 U.S. 820, 107 S. Ct. 84, 93 L. Ed. 2d 37 (1986).

In order for this court to have jurisdiction over a plaintiff's complaint, the Tucker Act requires that the plaintiff identify an independent substantive right enforceable against the United States for money damages. 28 U.S.C.A. § 1491 (West 1994 & Supp.1998). The Tucker Act states:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C.A. § 1491(a)(1). As interpreted by the United States Supreme Court, this Act waives sovereign immunity to allow jurisdiction over claims (1) founded on an express or implied contract with the United States; (2) for a refund from a prior payment made to the government; or (3) based on federal constitutional, statutory, or regulatory law. *United States v. Testan*, 424 U.S. 392, 400, 96 S. Ct. 948, 47 L. Ed. 2d 114 (1976) (quoting *Eastport S.S. Corp. v. United States*, 178 Ct. Cl. 599, 605-06, 372 F.2d 1002, 1009 (1967)); *see also Palmer v. United States*, 168 F.3d 1310, 1314 (Fed. Cir. 1999); *Stinson, Lyons & Bustamante, P.A. v. United States*, 33 Fed. Cl. 474, 478 (1995), *aff'd*, 79 F.3d 136 (Fed. Cir. 1996). A waiver of traditional sovereign immunity "cannot be implied but must be unequivocally expressed." *Saraco v. United States*, 61 F.3d 863, 864 (Fed. Cir. 1995) (quoting *United States v. King*, 395 U.S. 1, 4, 89 S. Ct. 1501, 23 L. Ed. 2d 52 (1969)), *cert. denied*, 517 U.S. 1166, 116 S. Ct. 1565, 134 L. Ed. 2d 665 (1996).

The Tucker Act, however, merely confers jurisdiction on the United States Court of Federal Claims, "it does not create any substantive right enforceable against the United States for money damages." *United States v. Mitchell*, 445 U.S. 535, 538, 100 S. Ct. 1349, 63 L. Ed. 2d 607 (1980) (quoting *United States v. Testan*, 424 U.S. at 398-99), *reh'g denied*, 446 U.S. 992, 100 S. Ct. 2979, 64 L. Ed. 2d 849

(1980); *see also Saraco v. United States*, 61 F.3d at 865 (citing *Zumerling v. Devine*, 769 F.2d 745, 749 (Fed. Cir. 1985)) (citing *United States v. Testan*, 424 U.S. at 398); *see also United States v. Connolly*, 716 F.2d 882, 885 (Fed. Cir. 1983) (en banc), *cert. denied*, 465 U.S. 1065, 104 S. Ct. 1414, 79 L. Ed. 2d 740 (1984). Individual claimants, therefore, must look beyond the jurisdictional statute for a waiver of sovereign immunity. *United States v. Mitchell*, 445 U.S. at 538. For claims founded on a statute or regulation to be successful, "the provisions relied upon must contain language which could fairly be interpreted as mandating recovery of compensation from the government." *United States v. Testan*, 424 U.S. at 400 (quoting *Eastport S.S. Corp. v. United States*, 178 Ct. Cl. at 607, 372 F.2d at 1009 (1967)); *see also Doe v. United States*, 100 F.3d 1576, 1579 (Fed. Cir. 1996), *reh'g denied* (1997).

The plaintiffs in the instant case allege that the actions approved by the bankruptcy courts resulted in takings by the defendant in violation of the Fifth Amendment to the Constitution and that defendant's failure to pay just compensation render the bankruptcy court actions void. As stated by the plaintiffs in their brief on jurisdiction:

> In the present case, the plaintiffs are not seeking to avoid, defeat, or evade any judgment of a bankruptcy court, or to deny any such judgment any effect. They do not seek relief **against any judgment**. They seek compensation as a result of the judgments. And because the Bankruptcy Court does not have the power or authority to order the Government to pay compensation as a result of a Fifth Amendment taking, the plaintiffs would have wasted both time and money if

> they had even asked the Bankruptcy Court in each respective case to consider that issue.
>
> Plaintiffs do not question the validity of the bankruptcy rulings per se. They claim that the rulings are wrong only if just compensation does not follow.

(Emphasis in original.)

Plaintiffs fail to cite any precedent, nor could this court find any reported cases, in which the discretionary actions of a Bankruptcy Court judge constitute a taking under the Fifth Amendment. Moreover, plaintiffs state in their brief:

> This is an admittedly novel application of the Takings Clause. If the court is looking for a precedent on point, the court will not find it. But that does not mean that the plaintiffs do not have a good cause of action. I believe we are on good ground in this matter. The trend in recent years has been to expand, not contract, the purview of Fifth Amendment takings claims.

In an attempt to demonstrate that a takings requiring compensation can result from decisions issued by the judicial branch, plaintiffs rely, by way of analogy, on two United States Supreme Court cases, and a case in the United States Claims Court, a predecessor to this court, which was affirmed by the United States Court of Appeals for the Federal Circuit and on which certiorari was denied. Contrary to plaintiffs assertions, however, none of these cases supports plaintiffs' argument that the actions of the bankruptcy judges who issued the decisions referred to in the various counts included in plaintiffs' complaint resulted in a constitutional taking.

In *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 573, 578 (1935), the creditor-plaintiff attacked the constitutionality of a statute, ("the Frazier-Lemke Act, June 28, 1934, c. 869, 48 Stat. 1289, 11 USCA § 203(s)"), which added a section to the Bankruptcy Act on the grounds that the Act violated the Takings Clause of the Fifth Amendment. Plaintiff in that case argued that the Act allowed the bankrupt entity to stall foreclosure proceedings and remain in possession of their mortgaged property, to the detriment of the plaintiff-creditor. The Supreme Court acknowledged that "[t]he bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment," while also noting that "[u]nder the bankruptcy power Congress may discharge the debtor's personal obligation, because . . . it is not prohibited from impairing the obligations of contracts." *Id.* at 589 (citations omitted). The Supreme Court noted that there had been instances in the past when "[s]tatutes for the relief of mortgagors, when applied to pre-existing mortgages, have given rise, from time to time, to serious constitutional questions." *Id.* at 581. Based on the issues presented, the Court found that the Frazier-Lemke Act, did constitute a taking of the "substantive rights in specific property acquired by the bank prior to the act." *Id.* at 590. The Supreme Court's opinion in *Louisville Joint Stock Land Bank v. Radford*, however, does not provide any support for plaintiffs' claims. The case stands for the principle that the actions of Congress can result in a Fifth Amendment taking, not for the concept that a taking can occur as the result of the authorized actions of a judicial officer.

Plaintiffs also cite and seek to rely on *United States v. Security Industrial Bank*, 495 U.S. 70 (1982), which similarly involved creditors who were seeking just compensation due to the impact of the enactment of a statute, in this case 11 U.S.C. § 522(f)(2), as part of the Bankruptcy Reform Act of 1978, Pub.L. No. 95-598, 92 Stat. 2549, on liens perfected before the Act was passed. The question presented was whether the statute invalidated liens acquired before the enactment date. *Id.* at 71. Again, the Supreme Court acknowledged that under Article 1, Section 8, Clause 4 of the Constitution, it is within the rational exercise of the authority of Congress to retrospectively impair contractual obligations. *Id.* at 74. The Court also agreed with the sentiment expressed in *Louisville Joint Stock Land Bank v. Radford* that if retroactive in nature, the statute could violate the Takings Clause of the Fifth Amendment to the Constitution because it would result in a taking of the creditor's interest held prior to the statute's enactment. *Id.* at 76-78. Because the Court did not find that the statute was intended to apply to prior established liens, it affirmed the Bankruptcy Court decisions at issue. *Id.* at 82. Once again, the decision cited by the above captioned plaintiffs does not support their theory that the discretionary actions of a bankruptcy judge can result in a constitutional taking of either creditors' or debtors' property.

In addition, plaintiffs try to rely on the Federal Circuit's decision in *Shanghai Power Company v. United States*, 4 Cl. Ct. 237 (1983), *aff'd*, 765 F.2d 159 (Fed. Cir. 1985)(Table), *cert. denied*, 474 U.S. 909 (1985). In this case, the plaintiff contended that the President's settlement of their claim against China, without the plaintiff's consent

and allegedly for a value disproportionate to its real value, entitled the plaintiffs to just compensation under the Fifth Amendment. As part of its analysis, the Federal Circuit suggested a similarity between the role of the President in settling foreign disputes to the power of Congress in drafting the statutory framework through which bankruptcy disputes are settled. *Id.* at 246. Specifically, referencing the congressional acts in *Louisville Joint Stock Land Bank v. Radford* and *United States v. Security Industrial Bank,* the Federal Circuit declared that: "Of course, when the bankruptcy power is exercised in a wholly novel and unexpected manner, frustrating the legitimate expectations of creditors, it may amount to an unconstitutional taking." *Shanghai Power Co. v. United States,* 4 Cl.Ct. at 247. However, the Court further pointed out:

> In light of these important policy considerations, a creditor cannot argue that bankruptcy proceedings are unlawful because he could have collected more had he been permitted to pursue other remedies. . . . Nor will a creditor be allowed to claim a taking because the debt has been discharged even though the debtor may eventually be able to pay off the full amount.

*Id.* at 246-47 (citation omitted).

As explained above, the United States Supreme Court has concluded that an act of Congress that invalidates prior established rights, such as liens or mortgages, could be considered novel or unexpected and, therefore, could constitute a taking for which just compensation must be

provided. These cases, however, still do not provide support for plaintiffs' proposition that authorized, discretionary decisions issued by an authorized member of the judiciary can amount to a taking.

Plaintiffs offer an additional theory that because of defendant's failure to pay just compensation to the plaintiffs, the bankruptcy courts' decisions were "void" within the meaning of RCFC 60(b)(4). RCFC 60(b) provides: "On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or preceding [sic] for the following reasons: . . . (4) the judgment is void."However, as the defendant points out, this court "lacks jurisdiction to entertain a Tucker Act claim under Rule 60(b) against the decisions of other courts." This trial court is not empowered to act as an appellate body with respect to the decisions of other courts. Plaintiffs' available course of relief was individually to seek review and appeal the decisions of the bankruptcy judges, which, according to the record, each of the plaintiffs, apparently, failed to do. Plaintiffs cannot circumvent the traditional review and appeals process simply by making a constitutional claim. The Supreme Court in *Celotex Corporation v. Edwards*, 514 U.S. 300 (1995), outlined the correct, "orderly" way to appeal bankruptcy decisions: "If dissatisfied with the Bankruptcy Court's ultimate decision, respondents can appeal 'to the district court for the judicial district in which the bankruptcy judge is serving,' . . . and then to the Court of Appeals for the . . . Circuit." *Id.* at 313 (quoting 28 U.S.C. § 158(a)); *see also* 28 U.S.C. § 158(d).

## CONCLUSION

While plaintiffs' claim may be creative, it is not supported by the procedures applicable to disputing decisions of federal bankruptcy court judges. Claims under the Fifth Amendment were not fashioned to function as an appellate process for bankruptcy court proceedings and cannot support a taking in the context suggested by the plaintiffs. The Court of Federal Claims does not have jurisdiction to review decisions issued during the normal course of bankruptcy proceedings. Relief from these judgments may be found in timely appeals to the appropriate federal district courts, Circuit Courts of Appeal and ultimately to apply for certiorari to the United States Supreme Court.

IT IS SO ORDERED.

/s/ Marian Blank Horn
MARIAN BLANK HORN
Judge